

February 19, 2013

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: Notice of Ex Parte – WC Docket No. 11-42 – Supplement to Request for Confidential Treatment of Nexus’ FCC Form 555

Dear Ms. Dortch:

On January 31, 2013, Nexus Communications, Inc. (“Nexus”) filed its Form 555 reports with the Commission and with USAC, in each case seeking confidential treatment of state-specific subscriber count and subscriber de-enrollment information under the provisions of 47 C.F.R. §§ 0.457 and 0.459, as well as the Freedom of Information Act, Exemption 4 (5 U.S.C. § 552(b)(4) and the Trade Secrets Act, 18 U.S.C. § 1905. (A copy of that request is attached hereto for ease of reference.) Subsequently, Ms. Kimberly Scardino, Acting Chief of the Telecommunications Access Policy Division, requested additional analysis justifying the request for confidentiality. This letter responds to that request.

Several considerations lead to the conclusion that this information should be accorded confidential treatment:

First is the overall market context. As the Commission is aware, the Lifeline wireless market is highly competitive. Very large entities such as TracFone and Virgin Mobile are major players, and in each state where Nexus operates, other, smaller wireless Lifeline eligible telecommunications carriers (“ETCs”) actively compete for the business of eligible telecommunications consumers. The Commission has recognized, endorsed, and relied upon this competition in the course of determining the fundamental rules it has established to govern this market segment, including its rules regarding which entities are permitted to compete in it. See, e.g., *Lifeline and Link Up Reform and Modernization*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC 6656 (2012) at ¶¶ 371, 378 (footnotes omitted, emphasis added):

[Enforcing the Section 214(e)(1) facilities requirement is not necessary] to ensure that Lifeline-only ETCs have charges, practices, classifications, and regulations for Lifeline service that are just and reasonable and not unjustly or unreasonably discriminatory. [Such ETCs] ***necessarily will face existing competition in the marketplace*** from the Lifeline offerings of the incumbent wireline carriers in the same designated areas, as well as other carriers, such as facilities-based wireless providers. ***Competition should help to keep their rates and other terms and conditions of service just and reasonable and not unjustly or unreasonably discriminatory. The additional competition that they provide would do more to ensure just and reasonable rates and terms than a requirement to use their own facilities.***

...

Our public-interest inquiry must include consideration of whether forbearance would promote competitive market conditions, including the extent to which such forbearance would enhance competition among providers of telecommunications services. We conclude that forbearance from the facilities requirement **will enhance competition among retail providers that service low-income subscribers. Lifeline-only ETCs offer eligible consumers an additional choice of providers for telecommunications services.** The prepaid feature that many Lifeline-only ETCs offer is an attractive alternative for subscribers who need the mobility, security, and convenience of a wireless phone, but who are concerned about usage charges or long-term contracts.

Given that the Commission has taken steps to enhance competition in this market segment, and relied upon the existence of competition to achieve its regulatory purposes, it is essential that the Commission be mindful of the deleterious impact on competition of requiring market participants to publicly reveal information that competitors in a traditional, non-regulated market would not normally disclose. Failure to respect the confidential nature of competitively relevant business information would be arbitrary and irrational because it would be contrary to, and undermine, the assumptions underlying and embodied in the Commission's basic approach to regulating this market segment.

Second, there can be no question that information specifically identifying the number of customers that Nexus has (or has lost – see *below*) in each state in which it operates is extremely sensitive and confidential business information. No normal, unregulated, competitive business would ever routinely publish this information, and courts have found its confidential nature to be sufficiently obvious not to require any detailed analysis of the issue. See, e.g., *L'Amy, Inc., v. LePage*, 2000 U.S. Dist. LEXIS 22957 (D. Conn. 2000) (finding as a fact that information about, *inter alia*, the “number” of customers constitutes “confidential information”). In a competitive market, different firms will employ different strategies for marketing, pricing, customer outreach, etc. Revealing how many customers Nexus has in each state will allow its competitors to see the precise degree to which Nexus' unique marketing and related efforts have been successful, diminishing the value of those efforts by allowing competitors to determine when and whether to copy them.

Indeed, the Commission itself has recognized the competitive nature of information that “would enable competitors to estimate carrier revenues for specific product families, particular customers, and geographic areas [would give] competitors a substantial competitive advantage.” *In Re The Lakin Law Firm*, Memorandum Opinion and Order, 19 FCC Rcd 12727 (2004) at ¶ 6 (internal quotes omitted). The information for which Nexus is here seeking confidential treatment is even more specific than that at issue in the *Lakin Law Firm* case, and, therefore, even more potentially damaging to Nexus' competitive position.¹

This is an even greater concern in the case of the state-by-state, month-by-month, category-by-category (non-usage versus non-response) figures for de-enrollment contained in the Form 555. While all Lifeline customers meet basic eligibility requirements set out by the Commission (e.g., participation in the federal

¹ This conclusion does not change even if it is possible for competitors, with some effort, to try to “reverse engineer” subscriber counts via other data, nominally publicly available. Indeed, the *Lakin Law Firm* case specifically protected information the disclosure of which was competitively problematic only in combination with publicly available information, and when the information only allowed competitors to “estimate” their rivals' sensitive information. See also *Skybridge Spectrum Foundation v. FCC*, 842 F. Supp. 2d 65, 81-82 (D.D.C. 2012). The fact that a competitor, with non-trivial effort based on public data, can develop estimates of its rivals' market position and other sensitive business information, does not justify making it easy for that result to occur by directly publishing the sensitive information. See, e.g., *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981).

Food Stamp program), there are various sub-groups within the overall market segment of eligible consumers. The marketing and customer outreach strategies of different Lifeline ETCs focus on different sub-groups. Providing state-by-state, month-by-month information about what portion of Nexus' customer base was de-enrolled for non-response and for non-usage will provide valuable information to competitors regarding the long-term economic benefits of targeting the market segments that are most responsive to Nexus' efforts. In an unregulated competitive market, rivals could obtain such information only by making their own decisions regarding the market segments on which to focus and trying their own competitive strategies. It would be rare indeed for an unregulated, competitive firm to publicly disclose how many customers it is losing, much less provide a categorization of those customers.

Moreover, there is no way of which Nexus is aware for competitors to even estimate these customer loss figures, other than via disclosure of Nexus' confidential information. Each month, a Lifeline ETC such as Nexus will gain new customers, lose some customers as a result of normal "churn," and lose some customers as a result of de-enrollments. Even if a competitor were able to develop some estimate of the overall size of the ETC's customer base (which would be far from easy), what mix of new customers, normal churn, and de-enrollments led to a given overall customer base would normally be utterly opaque to the competitor – **as it should be**. Competitors have no right to know how effective rivals' marketing or customer outreach efforts are on a month-by-month basis, and certainly no right to understand where their rivals are focusing their marketing efforts to offset de-enrollment and churn, as opposed to trying to simply grow the underlying customer base. The harm to Nexus' competitive position in this context would be caused solely and directly by the Commission's failure to protect Nexus' confidential information.

Third, there is no substantial or even identifiable public benefit to be obtained from requiring public disclosure of Nexus' state-by-state (much less month-by-month) subscriber and de-enrollment counts. As noted above, in this market segment the Commission itself has directly embraced the promotion of competition as not only in the public interest, but as critically important to assuring that subscribers have the best array of service choices. Taking steps that interfere with vigorous competition – and revelation of confidential information clearly does interfere with it – would therefore undermine the public benefits that competition is intended to promote. To the extent that the Commission is concerned with being able to monitor and report on the success of its efforts to eliminate duplication and waste in the Lifeline program, that purpose is entirely served by industry-wide aggregate data. Even with Nexus' information treated as confidential, the Commission would be able to report that on a nationwide or statewide basis, all ETCs combined de-enrolled a certain number of subscribers for non-usage, or that a certain percentage of duplicates were found, etc. And, of course, the key metric of the success of the Commission's efforts to more effectively manage the Lifeline program is not in data bearing on any specific, individual, ETC, but rather in the rate at which the Lifeline fund as a whole grows or contracts.

For all of these reasons, Nexus reaffirms its request that the specific subscriber counts and de-enrollment figures contained in its Forms 555 be treated as confidential under the terms of 47 C.F.R. §§ 0.457 and 0.459, as well as the Freedom of Information Act, Exemption 4 (5 U.S.C. § 552(b)(4) and the Trade Secrets Act, 18 U.S.C. § 1905.

Please contact undersigned counsel if you have any questions about this matter.

Sincerely,

Davis Wright Tremaine LLP

A handwritten signature in black ink, appearing to read "Chris W. Savage", with a stylized flourish at the end.

Christopher W. Savage

cc: Ms. Scardino

STAMP & RETURNSuite 800
1919 Pennsylvania Avenue NW
Washington, DC 20006-3401Danielle Frappier
202.973.4242 tel
daniellefrappier@dwt.com

January 31, 2013

FILED/ACCEPTED

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

JAN 31 2013

Federal Communications Commission
Office of the Secretary**Re: Request for Confidential Treatment of Nexus' Filing of FCC Form 555
WC Docket No. 11-42**

Dear Mr. Capozzi:

Pursuant to Sections 0.457 and 0.459 of the Commission's rules, Nexus Communications, Inc. ("Nexus") hereby requests confidential treatment of its FCC Forms 555 filing for data year 2012. Specifically, Nexus requests that these filings be withheld from routine public inspection, as they contain information that is of an extremely commercially-sensitive nature and that constitutes trade secrets. The confidential materials have been clearly marked "**CONFIDENTIAL—NOT FOR PUBLIC INSPECTION**," as instructed on the FCC Secretary's web page.

Section 0.457(d) of the Commission's rules provides that this information is automatically protected under the Commission's confidentiality procedures because it contains trade secret information. Section 0.457 of the Commission's rules also requires that the Commission treat as confidential documents that contain "trade secrets and commercial or financial information . . . not routinely available for public inspection."

As you are aware, these Commission regulations implement and incorporate exemptions from the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and the Trade Secrets Act, 18 U.S.C. § 1905. See 47 C.F.R. § 0.457(d). Under these exemptions, information is exempt from public disclosure if it is (1) commercial or financial in nature, (2) obtained from a person, and (3) privileged or confidential in nature. 5 U.S.C. § 552(b)(4). The information being provided by Nexus is exempt from public disclosure under the aforementioned

¹ 47 C.F.R. § 0.459(a) ("If the materials are specifically listed in § 0.457, such a request is unnecessary.")

exemptions and the FCC's regulations because it constitutes commercial and financial information, obtained from a person, which is confidential in nature.²

Similarly, Section 1905 of Title 18 of the United States Code makes it unlawful for federal government agencies or employees to disclose information relating to 'the trade secrets, processes, operations, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm partnership, corporation, or association....' Information that is exempt from release under Exemption 4 of the FOIA is prohibited from being disclosed, under 18 U.S.C. § 1905, unless disclosure is "authorized by law" by another statute other than FOIA.³ Because no other statute authorizes the release of the information at issue here, disclosure of the Documents is prohibited by the criminal provisions of 18 U.S.C. § 1905.⁴

Nevertheless, out of an abundance of caution, Nexus is also making a showing that the information would also qualify for protection pursuant to Commission rule 0.459.⁵ As required in rule 0.459, Nexus is providing below a statement of the reasons for withholding the information marked confidential, as well as a statement of facts underlying the information. **If upon review of this request, FCC decides not to grant this request, Nexus requests that FCC refrains from reviewing the enclosed materials and immediately contact the undersigned counsel.**

(1) Identification of the specific information for which confidential treatment is sought;

Nexus seeks to withhold from public inspection and otherwise seeks confidential treatment of the information contained in the enclosed FCC Forms 555, which contain state-specific subscriber counts, including the number of subscribers that responded to re-certification contacts, the number of ineligible subscribers, and other information regarding Nexus's communications services ("confidential information"). Nexus has marked each page of the response **"CONFIDENTIAL—NOT FOR PUBLIC INSPECTION."**

² Under Exemption 4 of the FOIA, the terms "commercial" and "financial" are to be given their "ordinary meaning," and thus include information in which a submitter has a "commercial interest" *Public Citizen Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); *accord, Washington Research Project, Inc. v. HEW*, 504 F.2d 238, 244 n.6 (D.C. Cir. 1974), *cert denied*, 421 U.S. 963 (1975). "Commercial interest" has been interpreted broadly to include anything "pertaining or relating to or dealing with commerce." *American Airlines, Inc. v. National Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978). The term "person," for FOIA purposes, includes entities such as Nexus. *See, e.g., Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 830 F.2d 871 n.15 (D.C. Cir. 1987) ("For FOIA purposes a person may be a partnership, corporation, association, or public or private organization other than an agency.").

³ *See Chrysler Corp. v. Brown*, 441 U.S. 281 (1979) (Exemption 4 and 18 U.S.C. § 1905 are "coextensive" and § 1905 prohibits the disclosure of confidential business information unless release is authorized by a federal statute other than FOIA); *see also* 47 C.F.R. § 0.457(d).

⁴ *See CAN Fin. Corp. v. Donovan*, 830 F.2d 1132, 1151 (D.C. Cir. 1987).

⁵ 47 C.F.R. § 0.459.

(2) Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission;

Nexus is providing this confidential information to FCC pursuant to 47 C.F.R. § 54.416(b).

(3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged;

Nexus is a privately-held entity that does not publicly disclose its subscriber counts, either state wide or in terms of the number of ineligible subscribers, de-enrolled subscribers, or other characteristics of its subscribers in terms of their eligibility characteristics.

(4) Explanation of the degree to which the information concerns a service that is subject to competition;

The market of providing communications services is highly competitive, and the Lifeline market in which Nexus operates is very highly competitive. There hundreds of Lifeline competitors, and many new firms looking to enter the Lifeline market on a daily basis.

(5) Explanation of how disclosure of the information could result in substantial competitive harm;

Disclosure of Nexus's subscriber counts and sensitive subscriber eligibility information would give competitors an unfair advantage by providing them with sensitive information that they could use to unfairly compete with Nexus.

(6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure;

Nexus has consistently sought to keep the confidential information from being publicly disclosed to the extent permissible under state and federal law.

(7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties;

Nexus has not previously made this information available to the public and only provides this information to its attorneys and advisors on a need-to-know basis.

(8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure; and

Nexus does not foresee a determinable date or timeframe after which it will no longer consider this information highly confidential, commercially-sensitive trade secret information.

(9) Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Danielle Frappier".

Danielle Frappier